No. 89-114

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEONARD M. FREEMAN, M.D.,

Petitioner,

—v.—

HEIDI WEISSMANN, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION AND BRIEF AMICI CURIAE IN SUPPORT OF PETITION OF ABASS ALAVI, M.D., WILLIAM H. BLAHD, M.D., FREDERICK J. BONTE, M.D., B. DAVID COLLIER, M.D., FRANK H. DELAND, M.D., ROBERT DONATI, M.D., STANFORD M. GOLDMAN, M.D., STANLEY J. GOLDSMITH, M.D., WILLIAM R. HENDEE, PH.D., B. LEONARD HOLMAN, M.D., JAMES KEREIAKES, PH.D., MYRON L. LECKLITNER, M.D., MERLE K. LOKEN, M.D., PH.D., LETTY GOODMAN LUTZKER, M.D., STEVEN PINSKY, M.D., E. JAMES POTCHEN, M.D., J.D., RICHARD C. REBA, M.D., LEONARD ROSENTHALL, M.D., ROBERT STADALNIK, M.D., RONALD L. VAN HEERTUM, M.D., and ALAN D. WAXMAN, M.D.

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Cooperative work in science is now the norm rather than the exception. Without minimizing the contributions of the unique loner possessed of genius, it can fairly be said that advances in modern science are largely the result of collaborative effort. A glance at any scientific journal will show that the overwhelming majority of new advances are credited to teams, not to individuals.

Amici are physicians, scientists and professors of medicine from medical schools, hospitals and professional societies throughout the country. They file this brief in their personal capacities because the Second Circuit's decision regarding the interface of the definitions of "created," "joint work" and "derivative work" under the Copyright Act, and the applica-

tion of the "fair use" doctrine in the context of the relationship between a derivative work and its underlying joint work, gravely endangers collaborative research and writing.

Many physicians and professors routinely participate in collaborations of the type at issue in the instant case. These long-term joint efforts necessarily involve revisions, elaborations and updates of continually evolving scientific works. If, as the Second Circuit has held, one of the collaborators is able to appropriate the fruits of a lengthy collaboration by declaring (retroactively) that the most recent revision belongs to him or her alone, the bond of trust—an essential ingredient to such an endeavor—will be broken. As a result, American researchers and teachers will shun creative cooperation, and American science and society as a whole will suffer.

SUMMARY OF ARGUMENT

As the petition for certiorari points out, Dr. Weissmann took the product of four years of joint effort, revised it (as the parties had done, sometimes alone and sometimes together, for years) by adding a small amount of material, some of which was prepared by Dr. Freeman, and, *after* Dr. Freeman had used it in the accustomed manner, announced that the new revision was hers exclusively. The Second Circuit produced a strained and artificial interpretation of the Copyright Act to sanction this conduct, and ignored the obvious applicability to Dr. Freeman's actions of the fair use defense. Because of that decision's ominous implications for science, this Court should grant a writ of certiorari and reverse the decision below.

REASONS FOR GRANTING THE WRIT

I

WHEN A WORK DERIVED FROM THE PARTIES' PRIOR JOINTLY AUTHORED WORKS IS A JOINT DERIVATIVE WORK IS AN IMPORTANT QUESTION OF COPYRIGHT LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The decision below insidiously undermines scientific teamwork in the United States. The Second Circuit has not only permitted respondent to appropriate the contributions of her colleague, mentor, and joint author, but has given her the weapon of copyright with which to defend her questionable act. Today a partner, tomorrow a competitor, enjoying the advantage of surprise and trading on the product of years of joint labor; this is the behavior the decision below rewards.

This is the first case since the enactment of the Copyright Act, 17 U.S.C. § 101 et seq., in which the interface of the definitions "created",[1] "joint work" and "derivative work" has been discussed by an appellate court. Because of the Act's definition of "created", the Second Circuit erroneously assumed that joint works and derivative works are mutually exclusive.[2] *Weissmann v. Freeman*, 868 F.2d 1313, 1315 (2d Cir. 1989). As hereinafter shown, this assumption runs contrary to the language of the Copyright Act and its legislative history.

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1 Section 101 of the Copyright Act provides in relevant part:

> A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

2 Specifically, the Second Circuit stated that this case presents "the novel question of whether a medical paper derived from the parties' prior jointly authored works is itself a joint work, or whether it is a copyrightable individual derivative work, the infringement of which gives rise to a cause of action under the Copyright Act . . ."

In addition, the Second Circuit's unsupported distinction between joint works and derivative works runs contrary to the longstanding expectations of innumerable scientists and medical researchers who continually work with one or more colleagues in creating and updating jointly authored works. Often, the authors alternate in updating these works with the reasonable assumption that copyright in the resulting derivative work will be jointly owned. In light of the widespread arrangements based on such expectations, it is imperative that the issue now be resolved by this Court.

Nothing in the Copyright Act or its legislative history compels the conclusion that a work of one author based on preexisting joint works of that author and another author cannot be a joint derivative work. Section 101 of the Copyright Act defines a "derivative work" as follows:

> A "derivative work" is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

The term "joint work" is defined in § 101 of the Copyright Act as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The essence of a joint work is a "joint laboring in furtherance of a preconcerted common design." 1 M. Nimmer, *Nimmer on Copyright* § 6.03 at 6-6 (1988). *See also Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 645 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972) ("When two or more authors pursuing a common design together create a single work, they become joint owners of the work"). Thus, joint and derivative works are not mutually exclusive.

Joint authorship does not require the joint authors to make their respective contributions during the same period. *Nimmer*

at 6-7. *See Edward B. Marks Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944). In *Marks*, a case decided under the 1909 Copyright Act (predecessor of the 1976 Copyright Act), a lyricist wrote the words for a song. Thereafter the lyricist's publisher procured a composer to write the music. In holding that the resulting song was a joint work, the court found it sufficient that the lyricist, at the time he wrote the words, intended them to be set to music, and that the composer, in writing the music, understood that it was for a particular set of lyrics. *Marks*, 140 F.2d at 266. The court stated:

> . . . it makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complimentary in that they are to be embodied in a single work to be performed as such.

Id. at 267. *See also Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947) (version of song "Melancholy Baby" held to be a joint work even though lyrics were substituted for those written earlier in personal collaboration with the composer).

The 1976 Copyright Act incorporates the *Marks* holding that an intention by the respective authors at the moment of their individual creations to merge the work with other works is sufficient to create a joint work upon such merger. Thus, the legislative history of § 201 states: "The touchstone [of a joint work] is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 120 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5736.

It is possible, and indeed essential in the context of continually evolving scientific and medical research and writing, for the "created", "derivative work" and "joint work" provisions of the Copyright Act to protect the expectations of scientific collaborators. As each of two or more collaborators alternates in making editorial revisions, annotations, elaborations or other modifications, separate versions of the work are "created" pursuant to the definition set forth in § 101. When those

modifications rise to the level of original works of authorship, a derivative work is created. *See, e.g., Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 35 (2d Cir. 1982) (new contributions to pre-existing sketch of copyrighted fictional character were sufficiently original to create a derivative work); 17 U.S.C. § 101 (defining "derivative work"). If, as in the instant case, that derivative work was created by one or more of the collaborators of the pre-existing joint work with the intention that it be merged into the preexisting joint work, and if, as in the instant case, the collaborators of the preexisting joint work intended when they created the preexisting joint work that such a merger would occur, the new work is a joint, albeit derivative, work. As such, it is jointly owned by the authors of the preexisting work and the author of the modifications to that joint work.

In such a common enterprise, when one or more of the collaborators adds a new contribution to the preexisting joint work, it is hardly open to him or her to later claim that no merger was intended—a person is, of course, deemed to intend the obvious consequences of his actions. Because intent to merge, and *not* intent to create a derivative work or a joint work, is what governs under the Copyright Act (*see* 17 U.S.C. § 101 (defining "joint work"); H.R. Rep. at 120), later assertions as to intent are irrelevant. Thus, any claim by Dr. Weissmann that she did not intend to merge her new contribution into the parties' pre-existing joint works, as well as her assertion that she intended to create a derivative work in which she alone owned the copyright, must be disregarded. Her intent to create a joint derivative work was manifested by virtue of the merger itself.

The Second Circuit understood that joint authorship results where "each author intend[s] his or her contribution, at the time that it is created, to become part of a unitary work to which another will make *or already has made* a contribution" (emphasis added). *Weissmann*, 868 F.2d at 1319. In addition, the Second Circuit recognized that it is extremely common in scientific research for preexisting joint works to be continually evolving. *Id.* For the Court of Appeals to then hold that joint works and derivative works, as defined under the Copyright

Act, are mutually exclusive turns the copyright law on its head and sets a dangerous precedent for those involved in scientific and medical research. It confers upon a collaborator a unilateral right to change the joint author relationship without first putting the other co-authors on notice. If this decision is permitted to stand, the Copyright Act will become a trap for the unwary in the important, sensitive area of medical research, and serve as an impediment to collaboration.

II

THE EXTENT TO WHICH A JOINT AUTHOR OF PREEXISTING JOINT WORKS MAY FAIRLY USE A DERIVATIVE WORK BASED ON THE JOINT WORKS IS AN IMPORTANT QUESTION OF COPYRIGHT LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Even assuming that Dr. Weissmann was entitled to appropriate the course syllabus to her own exclusive ownership, the doctrine of fair use should apply to protect her long-time collaborator's right to use the syllabus.

This Court has already recognized that copying an entire work can be fair use. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-450 (1984) (in the case of off-the-air video taping "the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use"); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1361 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (photocopying of entire articles in medical journals by government medical research organization constituted fair use). However, this is the first time the issue has arisen in the context of a joint author's use of his co-author's derivative work incorporating preexisting joint works by the parties.

"Fair use" under § 107 of the Copyright Act codifies a limited privilege to use copyrighted material despite the lack of the copyright owner's consent. *See Rosemont Enters., Inc. v. Ran-*

dom House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Ralph S. Brown, "The Widening Gyre: Are Derivative Works Getting Out of Hand?", *Cardozo Arts & Entertainment Law Journal* 1, 23 (1984) ("[fair use] is a shield . . . it is a marvelous safety valve to relieve the pressures of literal insistence on rights.") The doctrine balances the exclusive rights of copyright owners against "the public's interest in dissemination of information affecting areas of universal concern such as art, science and industry." *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The Second Circuit decision unjustifiably restricts the application of this "entirely equitable" doctrine. *See Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

Equity requires that a joint author's use of his co-author's individual derivative work based upon the parties' preexisting joint works be deemed fair use. *Cf. Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113, 120 (S.D.N.Y. 1982) ("Authors of compilations . . . must be held to grant broader licenses for subsequent use than persons whose use is truly creative."). Here, the new elements of respondent's individual derivative work were merely additions to, and in fact could not have existed independent of, the parties' preexisting joint works. *See Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 (5th Cir. 1980) (where the cover of a magazine constituted only part of a collective work, the fact that such part was itself the subject of a separate copyright was not found to be copying of an "entire" work). To deprive a joint author of the use, for teaching purposes, of a work derived from and wholly dependent upon his efforts is grossly unfair and defeats the equitable purpose of the fair use doctrine.

A finding of fair use by a joint author is particularly appropriate in the context of a factual work where copyright protection is narrower, and the corresponding application of the fair use defense greater, than in the case of works of fiction or fantasy. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985); *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert.*

denied, 469 U.S. 823 (1984) ("Since the risk of restraining the free flow of information is more significant with informational work, the scope of permissible fair use is greater."). To hold otherwise will result in instilling mutual mistrust in countless academic collaborators and promote a "race to update", to the detriment of American medical science and education.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the decision of the Court of Appeals should be reversed.

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